OCT. 3 1955
HAROLD B. WILLEY, C

No. 444

IN THE

Supreme Court of the United States

October Term, 1955

BINGLER VACATION TOURS, INC., *Appellant*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellees*.

Appeal from the United States District Court for the District of New Jersey

---

STATEMENT AS TO JURISDICTION

EDWARD G. WEISS,
140 Market Street,
Paterson, New Jersey,

WILMER A. HILL,
Transportation Building
Washington 6, D. C.,
Attorneys for Appellant.

Byron S. Adams, Washington, D. C.

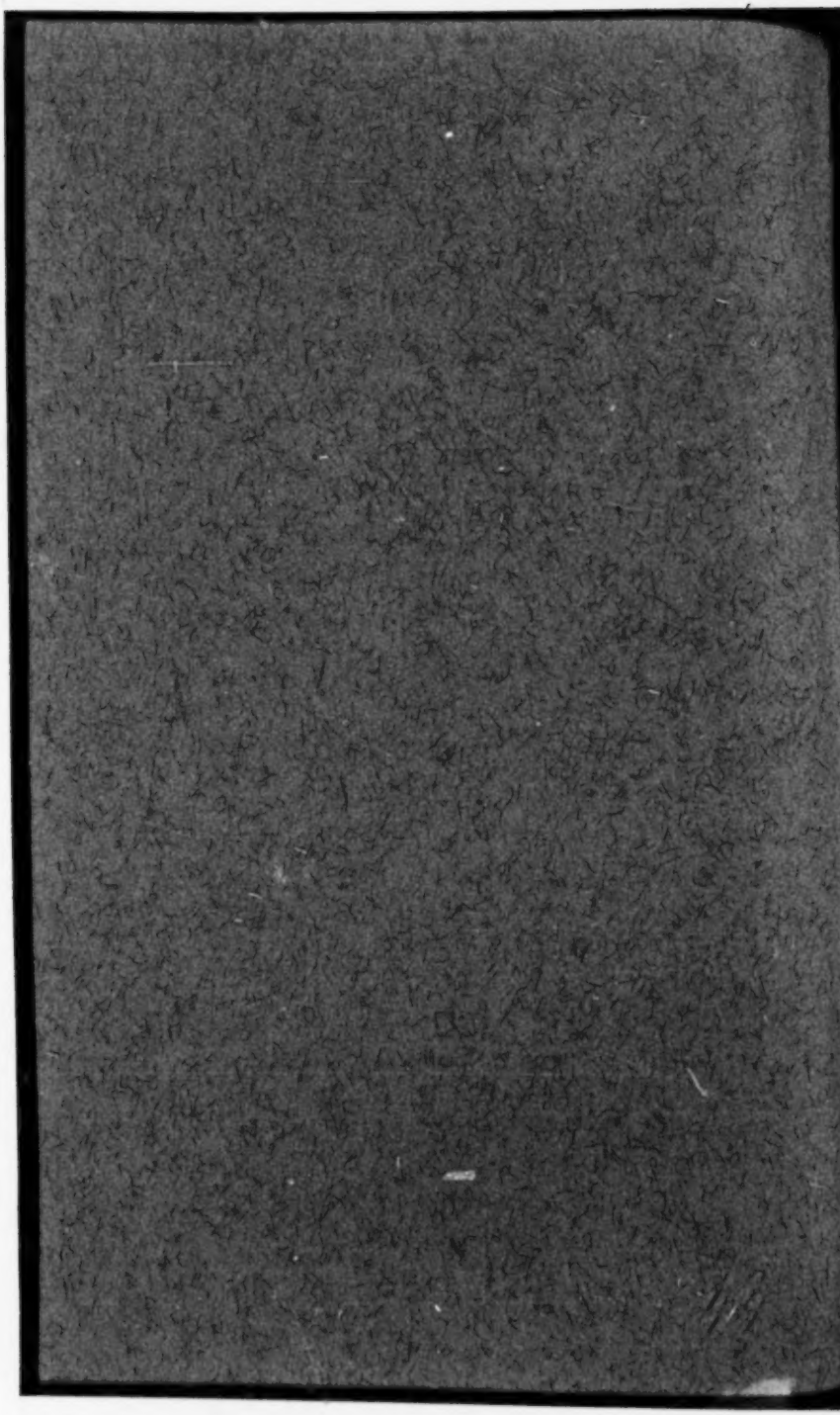

TABLE OF CONTENTS

	Page
ATEMENT AS TO JURISDICTION	1
INION BELOW	2
SIS OF JURISDICTION	2
ATUTES INVOLVED	3
ESTIONS PRESENTED	4
ATEMENT OF THE CASE	5
IE LAW DRAWS NO DISTINCTION BETWEEN AUTHORITY TO CONDUCT ROUND-TRIP SIGHTSEEING OR PLEASURE TOURS IN A TERRITORY AND CORRESPONDING AUTHORITY BETWEEN SPECIFIED POINTS	7
IE COMMISSION'S REPORT AND ORDER ARE VAGUE IN THEIR TERMS, GO BEYOND THE ISSUES AND ARE THEREFORE ARBITRARY AND CAPRICIOUS	19
IE QUESTIONS PRESENTED ARE SUBSTANTIAL	26
NCLUSION	27
RTIFICATE OF SERVICE	27
PPENDIX A—Findings of Fact and Conclusions of Law of Court Below	1a
PPENDIX B—Opinion of Court Below	8a

CASES CITED

nerican Trucking Assn. v. United States, 344 U.S. 298	3
kansas R. Commission v. Chicago, R. I. & P. R. Co., 274 U.S. 597	12, 22
bury Park-N. Y. Transit Corp. v. Bingler Vacation Tours, 62 M.C.C. 731; 62 M.C.C. 802	2, 4
ltimore & Ohio R. Co. v. United States, 22 Fed. Supp. 533, 536-7	23
rolina Freight Carriers Corp. Com. Car. Application, 24 M.C.C. 305	10

Page

Ted Courtney and Paul Lester Common Carrier Application, 47 M.C.C. 885 13
Florida v. United States, 282 U.S. 194 .....12, 22, 24
Interstate Commerce Commission v. Parker, 326 U.S. 60 3
Interstate Commerce Commission v. Union P. R. Co., 222 U.S. 541 22
Lawrence v. St. Louis-San Francisco Ry. Co., 274 U.S. 588 22
Public Service Interstate Transp. Co. Com. Car Applic., 42 M.C.C. 277, 287 14
Red Star Sightseeing Line, Inc., Common Carrier Application, 1 M.C.C. 521, 522 16
United States v. Capital Transit Co., 338 U.S. 286 .. 3
United States v. Carolina F. Carriers Corp., 315 U.S. 475 10
United States v. Chicago, M., St. P. & P. R. Co., 294 U.S. 499 .....22, 25
United States v. Pierce Auto Freight Lines, 327 U.S. 515 3

IN THE

Supreme Court of the United States

October Term, 1955

No

BINGLER VACATION TOURS, INC., *Appellant,*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellees.*

Appeal from the United States District Court for the District of New Jersey

---

STATEMENT AS TO JURISDICTION

Bingler Vacation Tours, Inc., appellant, hereinafter sometimes called simply Bingler, submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW

The final judgment of the United States District Court for the District of New Jersey, dated June 9, 1955, is attached hereto as Appendix A. The opinion of the Court, attached hereto as Appendix B, was filed on July 14, 1955. The two decisions of the Interstate Commerce Commission, hereinafter called the Commission, from which this proceeding springs, *Asbury Park-N. Y. Transit Corp.* v. *Bingler Vacation Tours,* are reported at 62 M.C.C. 731 and 62 M.C.C. 802. The latter, following oral argument before the entire Commission, is not printed in full in the permanent series of motor-carrier reports of the Commission but is set forth in full in the transcript of record in this cause prepared by the Clerk of the United States District Court for the District of New Jersey for transmission to the Clerk of the Supreme Court of the United States. In its opinion the District Court inadvertently cites this latter decision as at 62 M.C.C. 731.

BASIS OF JURISDICTION

This suit was brought by Bingler, a common carrier of passengers by motor vehicle in interstate commerce to set aside and enjoin an order of the Commission entered October 4, 1954, under section 204(c) of the Interstate Commerce Act, 49 U.S.C. 304(c). The said order directed Bingler "to cease and desist, and unless and until appropriate authority therefor is obtained, thereafter to refrain and abstain, from the performance of any transportation, in interstate or foreign commerce, of the character found in said report on oral argument to be beyond the scope of the authority heretofore granted to it."

The suit likewise sought to set aside an order of the Commission, entered January 17, 1955, which denied the petition of Bingler "for (1) reconsideration by the entire Commission, or, in the alternative, for institution of a general investigation and reopening of the instant proceeding for further hearing therewith, and (2) for indefinite postponement of effective date of outstanding cease-and-desist order pending such reconsideration or further hearing."

The jurisdiction of the Supreme Court of the United States to review the decision of the District Court on direct appeal is conferred by 28 U.S.C. 1253 and 2101 (b), and is sustained by the following cases: *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515; *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60; *American Trucking Assn.* v. *United States,* 344 U.S. 298; *United States* v. *Capital Transit Co.,* 338 U.S. 286.

STATUTES INVOLVED

The pertinent portions of Part II of the Interstate Commerce Act, 49 U.S.C. 301 et seq., are as follows:

> *Sec. 204(c), 49 U.S.C. 304(c):* Upon complaint in writing to the Commission by any person, * * * the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. * * *
>
> *Sec. 206(a), 49 U.S.C. 306(a):* * * * no common carrier by motor vehicle subject to the provisions

of this part shall engage in any interstate or foreign operation on any public highway * * * unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: * * *

QUESTIONS PRESENTED

The questions presented by this appeal are as follows:

(1) Whether the District Court was in error in holding that the Commission did not err as a matter of law in attempting, in *Asbury Park-N. Y. Transit Corp.* v. *Bingler Vacation Tours, supra,* to draw a distinction between the carriage of passengers in "special operations * * * in round-trip sight-seeing or pleasure tours" which involve radial or territorial grants of authority from the said Commission (the typ of authority held by appellant) and the carriage of passengers in "special operations * * * in round-trip sightseeing or pleasure tours" between specified *points* (the type of authority which the Commission had elsewhere found contemplated precisely such operations as those of appellant which were under attack before it); and

(2) Whether the District Court was in error in failing to hold that the report and order of the Commission in the said proceeding before it are vague in their terms, transcend the issues, and are therefore arbitrary and capricious.

STATEMENT OF THE CASE

The administrative proceeding which gave rise to the Commission order here under consideration was initiated by the filing with the Commission of com-

plaints by two regular-route common carriers of passengers by motor vehicle between New York City and specified points in New Jersey and Pennsylvania. By these complaints it was alleged that during stated periods of 1948 and 1949 Bingler transported passengers between New York City, on the one hand, and, on the other hand, (1) the track of the Monmouth Park Jockey Club, Inc., at Oceanport, N. J., (2) the Garden State Race Track near Camden, N. J., and (3) Asbury Park N. J., over regular routes, without authority and in violation of section 206(a) of the Interstate Commerce Act. The prayer of the complaints was for entry of an order requiring Bingler to cease and desist from the alleged violations. At no time during the course of the proceedings did the Commission intimate, or even hint, that it contemplated granting any other type or measure of relief.

So far as here pertinent, the certificate by virtue of which Bingler performed the services assailed in the two complaints authorized the carriage of passengers and their baggage, in interstate or foreign commerce, over irregular routes, in special operations, restricted to traffic originating at the points indicated, in round-trip sightseeing or pleasure tours, from points and places in Passaic, Bergen and Essex Counties, N. J., and New York, N. Y., to points and places in Connecticut, Delaware, Maine, Maryland, Massachusetts, North Carolina, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and the District of Columbia, and return.

The proceedings before the Commission hinged on the significance to be accorded that portion of the above authority which provides for service "over ir-

regular routes in special operations, restricted to * * * round-trip sightseeing or pleasure tours."

Following formal hearing and the customary procedural steps, the rendering of a report by Division 5 of the Commission (62 M.C.C. 731), reopening for oral argument, the hearing of oral argument before the entire Commission, and the filing of post-argument briefs, the Commission found that Bingler's *assailed* operations were without appropriate authority and in violation of section 206(a) of the Interstate Commerce Act. Appended to the report containing those findings, however, was an order by the terms of which Bingler was "notified and required, on or before November 22, 1954[1], to cease and desist, and unless and until appropriate authority therefor is obtained, thereafter to refrain and abstain, from the performance of any transportation, in interstate or foreign commerce, of the *character* found in said report on oral argument to be beyond the scope of the authority heretofore granted to it." (Emphasis supplied). Under date of January 17, 1955, the entire Commission denied Bingler's aforementioned petition of December 3, 1954, for reconsideration and the other described relief, whereupon Bingler filed the bill of complaint in the District Court.

---

[1] The effective date of the cease-and-desist order was successively postponed by the Commission until December 20, 1954, January 31, 1955, February 10, 1955, May 10, 1955, and, finally, until June 10, 1955. As indicated, the judgment of the District Court was entered on June 9, 1955.

THE LAW DRAWS NO DISTINCTION BETWEEN AUTHORITY TO CONDUCT ROUND-TRIP SIGHTSEEING OR PLEASURE TOURS IN A TERRITORY AND CORRESPONDING AUTHORITY BETWEEN SPECIFIED POINTS

In order to reach its conclusion that the assailed operations are beyond the scope of Bingler's certificate, the Commission attempted to draw a distinction between "special operations * * * in round-trip sightseeing or pleasure tours" which involve *radial or territorial* grants of authority, the type of authority held by Bingler, and "special operations * * * in round-trip sightseeing or pleasure tours" *between specified points,* the type of authority granted by it in the cases cited at the top of page 77 of Bingler's bill of complaint in the District Court. The Commission's reasoning on the subject (see Appendix E of the bill of complaint, pages 76 and 77) follows:

> With respect to previously decided proceedings involving territorial grants of authority in round-trip, sightseeing or pleasure tours, we note that generally there has been a genuine effort to distinguish such operations from those of the ordinary regular-route passenger carrier. (Citing and construing cases.) The *Smoky Mountain case, supra,* involved tours over a regular route between fixed termini, and the *Sevitch case,* the *Resler case,* the *Public Service case,* and the *Prue case,* all cited in footnote 5, involved operations between fixed termini and in these latter cases regardless of the other characteristics of the operations, the respective carriers obviously are free to operate between the specified points because the authority was specifically granted for that purpose. In any event, no operational analogy necessarily follows between a certificate which authorizes specified points and one which authorizes specified points

(sic) and one which authorizes territorial operations as involved herein.

From the foregoing, it is abundantly clear, that round-trip sightseeing or pleasure tours, in special operations, which involve radial or territorial grants of authority, must include something substantial in addition to, or different from, bare expeditious transportation between two points which factor is the fundamental characteristic of ordinary regular-route passenger-carrier service. Thus, if some *substantial* accessorial or different service is not provided the operation must be classed as that of an ordinary regular-route carrier. Where the tour covers a number of points or places involving sightseeing and leisurely travel, it is not so important whether we look further to see that other extra services are apparent because an operation of that sort would on its face seem to meet the uniformly defined and commonly understood meaning of the term "tour" as heretofore described. When, however, a carrier holding tour authority on a *radial or territorial basis* undertakes to set up a tour of one day or less between two specific points it then becomes important that something extra and something substantial be added to the bare transportation involved. If regularity, frequency, and expeditious service are introduced as additional factors in such point-to-point operation, then progressively it becomes even more important that these characteristics of an ordinary passenger operation not predominate in the service which is offered and provided to its patrons.

We cannot understand how the Commission could come to the conclusion that the assailed operations conducted by Bingler to the named race tracks and to Asbury Park are not tours because Bingler's authority embraces a *territory* within which the origins

and destinations lie, but that identical operations become round-trip sightseeing or pleasure tours when so described in a certificate *expressly naming the origins and destinations.* Nor can we understand how the District Court, by its silence on the subject, could have accepted or condoned this faulty reasoning by the Commission. As we view it, such reasoning is strained and wholly fallacious. What the Commission did, manifestly, was to confuse the nature of the *proceeding* in which the authority has been granted with the nature of the *authority* itself. The District Court fell into damaging error by failing to recognize this.

The Court will search in vain through the Interstate Commerce Act for any support for this unnatural construction which the Commission has placed upon Bingler's certificate. Section 206(a) of the Interstate Commerce Act authorizes no distinction of any sort in the operations to be conducted under whatever type certificate may be issued by the Commission, and section 207(a) of that Act merely provides so far as here pertinent that "no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes and between fixed termini, except as such carriers may be authorized to engage in special or charter operations." It can make no possible difference that the authority issued by the Commission permits in the one instance the conducting of tours between points explicitly named while in the other instance, (as in the case of Bingler) it permits such tours in a territory embracing the very same points among others. Either the operation *is* a tour or it *is not* a tour, however broad or limited the locale; by just what process of ratiocination would a tour specifically authorized by

the Commission between named points lose its character as such because it chanced to be conducted between those same points by a carrier (Bingler) whose authority from the Commission embraced an area or territory? Obviously, we submit, such a metamorphosis as the Commission here envisages cannot be rationalized.

In its legal aspects the situation with which we are here confronted is closely akin to that considered by the Supreme Court of the United States in *United States* v. *Carolina F. Carriers Corp.*, 315 U.S. 475. In *Carolina Freight Carriers Corp. Com. Car. Application*, 24 M.C.C. 305, wherein the applicant had sought authority as a common carrier by motor vehicle to transport general commodities over irregular routes between described areas, the Commission had sought, under the provisions of the "grandfather" clause of section 206(a) [49 U.S.C., sec. 306], to restrict the scope of the applicant's certificate to the carriage of a few specified commodities between given points. As a justification for this radical reduction of the applicant's authority, the Commission had the following to say at pages 308 and 309:

> * * * Furthermore, we have frequently stated that authority to transport general commodities throughout a wide territory, over irregular and unspecified routes, pursuant to the "grandfather" clauses of the act, should be granted to a carrier only when such carrier's right thereto has been proved by substantial evidence. To do otherwise would create the very ills which regulation is designed to alleviate, namely, congestion of highways, destructive rate practices, and unbridled competition. *Common carriers which are expected to maintain regular service for the movement of freight in whatever quantity offered, to and from*

all points on a specified route, cannot operate economically and efficiently if other carriers are permitted to invade such routes for the sole purpose of handling the cream of the traffic available thereon in so-called irregular-route service. * * * (Emphasis supplied)

Upon appeal from a decree of a statutory court of three judges which had set aside the order of the Commission, the Supreme Court of the United States had this to say at pages 484-486:

* * * But we conclude that there is no statutory warrant for applying to irregular route carriers a different or stricter test as to commodities which may be carried than is applied to regular route carriers. The difference between those types of carriers may well justify a sharp delimitation of the far flung territory which an irregular route carrier may profess to serve. But once the territory has been defined, the statutory test of whether an applicant was a "common carrier" by motor vehicle in "bona fide operation" during the critical periods is the same for the irregular and the regular route carrier. We are not confident that the Commission has approached the problem in that way. For it has repeatedly stated beginning with *Re Powell Bros. Truck Lines,* 9 MCC 785, 791, 792, that:

"Authority to transport general commodities throughout a wide territory over irregular and unspecified routes pursuant to the 'grandfather' clause of the act should be granted to a carrier only when such carrier's right thereto has been proved by substantial evidence. To do otherwise would create the very ills which regulation is designed to alleviate, namely, congestion of highways, destructive rate practices, and unbridled competition. Common carriers which are expected to maintain regular service for the movement of

freight in whatever quantities offered to and from all points on specified routes cannot operate economically and efficiently if other carriers are permitted to invade such routes for the sole purpose of handling the cream of the traffic available thereon in so-called irregular-route service."

And see *Re Merchants Parcel Delivery Co.* 21 MCC 93; *Re Langer Transport Corp.* 23 MCC 302; *Re Lett & Co.* 26 MCC 159.

In so far as that view establishes a different test for commodities which may be carried by irregular route operators than for commodities which may be carried by regular route operators it is erroneous as a matter of law. For facts sufficient to establish that a person is a "common carrier" by motor vehicle in "bona fide operation" in the one case are sufficient in the other. The statutory differences lie only in the territorial scope and pattern of the operation. (Emphasis supplied)

Here again, the Commission—with the approval of the District Court—is guilty of the very type of unsound reasoning which the Supreme Court of the United States condemned in the cited case. It has sought to apply one standard—a relaxed standard—to the operations conducted by the carrier which holds authority in special operations in round-trip sightseeing or pleasure tours *between specified points,* but a quite different and more rigid standard to the operations conducted by the carrier which has been operating for many years in a *territory.* This is without statutory sanction; the statute does not even imply, far less, provide, such a distinction. The Commission may not exercise one whit more than its delegated powers. *Florida* v. *United States,* 282 U.S. 194; *Arkansas R. Commission* v. *Chicago, R. I. & P. R. Co.,* 274 U.S. 597. It cannot legislate, as it would do here.

It will be kept in mind also that it is declared to be the national transportation policy of the Congress to which all of the provisions of the Interstate Commerce Act are made subject, "to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices * * *." [49 U.S.C., preceding sections 1, 301, 901, and 1001]. This decision by the Commission is a far cry from the Congressional prohibition against "unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices."

As we have previously pointed out to the Commission (see Appendix F of our bill of complaint), the contradictory nature of its finding here is well illustrated by a contrasting of that finding with its findings in other cases before it. In *Ted Courtney and Paul Lester Common Carrier Application,* 47 M.C.C. 885[2], the applicants sought authority to transport passengers between Mayfield, Ky., and Nashville, Tenn., in order that they might attend a particular radio show which was broadcast every Saturday night

[2] In which, incidentally, the Commission went so far as to denominate as "round-trip pleasure tours" the operations for conduct of which Courtney and Lester had sought the conventional regular-route passenger-carrying authority.

from a station in Nashville. Courtney and Lester proposed to sell individual tickets which would include the admission price to the show. The bus was to leave Mayfield every Saturday afternoon, arriving in Nashville in time for the show and returning to Mayfield immediately upon the completion of the show. No passengers were to be picked up or discharged other than at Mayfield. As indicated, Division 5 of the Commission found that "the present and future public convenience and necessity require operation by applicants as a common carrier by motor vehicle, in interstate or foreign commerce, of passengers, in special operations consisting of round-trip pleasure tours, beginning and ending at Mayfield, Ky., and extending to Nashville, Tenn., with no pickup or discharge of passengers enroute," over a described regular route. If the proceeding in question had chanced to be within the territorial scope of Bingler's certificate, it would have followed that the applicants there, *under precisely the same terminology*[3] as that appearing in Bingler's certificate, would be able to perform a service between the two specified points which the Commission would here forbid Bingler's rendering between those points. We confess that we are wholly unable to grasp reasoning so abstruse.

Another decision which illustrates and emphasizes the artificial nature of the Commission's attempted distinction is *Public Service Interstate Transp. Co. Com. Car. Applic.*, 42 M.C.C. 277, 287, wherein, under the aforementioned "grandfather" clause, authority was granted to the carrier for the transportation of passengers and their baggage in special operations, in round-

[3] Except, of course, that the word "sightseeing" was omitted.

trip sightseeing or pleasure tours from New York City for skating and ice-boating at Greenwood Lake, N. Y., the most distant point on the tour. That grant, be it noted, authorized service in the very territory in which Bingler holds the disputed authority. Under the Commission's findings here, if Public Service. Interstate Transportation Company and Bingler operated *identical* one-day trips, side by side, over the same highways, at the same time of the day, from New York City to Greenwood Lake in special operations to enable the passengers to indulge in the sports of skating or ice boating, the trip operated by Public Service Interstate Transportation Company would be a tour but the identical trip operated by Bingler would *not* be a tour. It hardly seems possible that the Commission and the District Court could have been aware of the curious result of the Commission's findings.

It is of interest,[4] too, that Quaker City Bus Company, *one of the complainants here,* holds a certificate authorizing the carriage of passengers and their baggage, in special operations, in round-trip sightseeing or pleasure tours, over irregular routes, beginning and ending at Philadelphia, Pa., or Camden, N. J. and extending to Graymoor, at Garrison, N. Y., and the United States Military Academy at West Point, N. Y., that Public Service Interstate Transportation Company holds a certificate in No. MC-3647 (Sub-No. 59) authorizing the carriage of passengers and their baggage in round-trip sightseeing or pleasure tours, over irregular routes, beginning and ending at Philadelphia, Pa., and Camden, Elizabeth, Jersey City, Newark, and Paterson, N. J., and extending to Gray-

[4] And we have previously requested the Commission to take official notice thereof.

moor, that the same carrier holds certificates in Nos. MC-3647 (Sub-Nos. 79 and 127) which authorize many services which are identical with those just named except in respect to the origins and destinations, and that in principle the services rendered by virtue of such certificates do not differ in even minor respects from those rendered by Bingler to and from Asbury Park and the race tracks. Here again, we find that under the Commission's unwarranted conclusions the very operations which constitute a round-trip sightseeing or pleasure tour for Quaker City Bus Company and Public Service Interstate Transportation Company would not be a round-trip sightseeing or pleasure tour if conducted by Bingler.

In the first decision herein (see Appendix C of bill of complaint, page 46) Division 5 found (and the entire Commission has never disavowed that finding) that the grant of authority to Bingler "is identical in form with the authority granted in numerous other cases." But in those other cases the recipients of the grants may conduct a type of operation which the Commission and the District Court will not now permit Bingler to conduct, despite this identity in form.

In support of its concurrence in the Commission's drawing of a distinction between authority to conduct round-trip sightseeing or pleasure tours in a territory and corresponding authority between specified points, this District Court has the following to say in its opinion of July 14, 1955:

> The nature of this distinction is illustrated by the decision of Division 5 of the Commission in Red Star Sightseeing Line, Inc., Common Carrier Application, 1 M.C.C. 521, 522 (1937), discussed at length in Bingler's brief. Red Star, which op-

erated all-expense trips of several days duration through various states, also conducted one-day trips to Asbury Park and to Lake Hopatcong, New Jersey. On the basis of all of these operations Red Star was granted a territorial tour certificate. But the opinion in the Red Star case reveals that "something extra and something substantial" was added to bare transportation to Asbury Park and Lake Hopatcong. The Commission states: "Tickets are sold individually in advance for reserved seats for specific round-trip tours, with no pick-up or discharge of passengers en route. Stops are made at various points of interest, with the driver acting as a guide in instances where no guides are on duty." Thus, where something more than bare expeditious transportation characterizes the service, point-to-point operations may be conducted under a territorial tour certificate. See, *e.g.,* Blue & Grey Sight Seeing Tours, Inc., Common Carrier Application, 8 M.C.C. 124 (1938), and Resler v. Hunter Clarkson, Inc., 41 M.C.C. 665 (1943).

But in this the District Court is in manifest error. In the *Red Star case* the Commission, in response to a late-filed "grandfather" application, granted to the applicant, Red Star, authority to operate in special operations in the conduct of round-trip sightseeing or pleasure tours beginning and ending in the Borough of Brooklyn, New York City, and extending to points in New Jersey, New York, Connecticut, Pennsylvania, Delaware, the District of Columbia, Maryland, Massachusetts, and Virginia. Obviously, *this proceeding involved a territorial grant of authority,* just as in the case of Bingler. The rates charged for Red Star tours lasting longer than one day included hotel accommodations, certain meals, admission, sightseeing and guide fees, and boat trips at points of interest; this was *not* true of the shorter tours, such as those to Asbury

Park, which latter were expressly mentioned by the Commission. In its report herein the Commission dismisses the *Red Star case* as of no consequence (notwithstanding, as stated, that it had to do with a territorial grant) because, it says, the one-day tours each week to Asbury Park were not singled out in the report as having any special significance. But certainly those tours had just as much significance as did the same tours when conducted by Bingler as a part of *its* general operations, which included a wide variety of extensive tours, in the conduct of which Bingler sold tickets in advance, made provision for reserved seats, and provided for tour conductors or guides; and we repeat—as we emphasized in our petition of December 3, 1954, to the Commission (see Appendix F of our bill of complaint, page 91)—that (1) both Red Star and Bingler specialize in schedules to Asbury Park; (2) that the pattern of Bingler's tours to and from Asbury Park was no more rigid than was the Red Star pattern, although the former's tours were more frequent; (3) that Red Star's operations to and from Asbury Park were designed to accord precisely the same "beach-type" service as are Bingler's operations to and from the same point; (4) that in its Asbury Park operations Bingler caters to the same type prospective passenger as did Red Star and that no distinction can possibly be drawn between the two carriers on the score of possible diversion of traffic from regular-route operators; (5) that both Red Star and Bingler advertise their Asbury Park tours, the only difference being that Bingler's method of advertising has been more effective; (6) that both Red Star and Bingler use unvarying departure points, Red Star's being from its office in Brooklyn and Bingler's being from one of the smaller bus terminals in New

York City; (7) that both Red Star and Bingler use substantially the same routes to Asbury Park; (8) that frequency constituted the only difference in the periodicity of service rendered by the two carriers; and (9) that Red Star, just as does Bingler, was forced to publicize the departure hour of its buses from Brooklyn to Asbury Park.

The tours to Asbury Park constitute a part of the general operations of Bingler, just as they once constituted a part of the general operations of Red Star. But in the *Red Star case* the Commission, by express reference thereto, gives to the Red Star operations to Asbury Park the blessing which it withholds from the very same operations when conducted by Bingler. The effort of the Commission and of the District Court to distinguish the Bingler certificate from the certificate issued in the *Red Star case* must surely be found futile.

THE COMMISSION'S REPORT AND ORDER ARE VAGUE IN THEIR TERMS, GO BEYOND THE ISSUES, AND ARE THEREFORE ARBITRARY AND CAPRICIOUS

As Bingler pointed out in its petition to the Commission under date of December 3, 1954 (Appendix F to the bill of complaint, page 86), the issues in the proceeding before the Commission were sharply drawn, Bingler being explicitly charged with but two sorts of illegal operations, namely, (1) those to the named race tracks and (2) those to Asbury Park. There is no other challenge of its operations. But, as we stated earlier herein, the cease-and-desist order appended to the report of October 4, 1954 (Appendix E to the bill of complaint, page 80) is not confined to the issues. It far transcends those issues. It requires, *not* that Bingler refrain and abstain from the per-

formance of the transportation expressly called in question in the complaints, but that it refrain and abstain "from the performance of *any* transportation, in interstate or foreign commerce, of the *character* found in said report on oral argument to be beyond the scope of the authority heretofore granted to it" (emphasis supplied). Bingler is left to determine unaided which, if any, of its other operations are not tours and are therefore without the scope of its certificate and which may be lawfully conducted. Yet, peculiarly enough, the Commission, so ready to cast this unreasonable and onerous burden upon Bingler, has the following to say in its said report (Appendix E to the bill of complaint, page 77):

> It is neither necessary nor would it be wise for us to undertake to name or to state the number of those additional things involving sightseeing or pleasure which a transportation service must possess to become a tour.

Thus we have the Commission, wholly unwilling or unable itself to specify the factors which constitute a given operation a tour, nevertheless forcing Bingler, with the approval of the District Court, to solve the problem under peril of the heavy penalties provided by section 222[5] of the Interstate Commerce Act (49 U.S.C., sec. 322) for willful violation of any term of

---

[5] So far as here pertinent, section 222 reads as follows:

(a) Any person knowingly and willfully violating any provision of this part, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate, permit, or license, for which a penalty is not otherwise herein provided, shall, upon conviction thereof, be fined not more than $100 for the first offense and not more than $500 for any subsequent offense. Each day of such violation shall constitute a separate offense.

a certificate. If this order remains in force and effect Bingler will be in danger of prosecution for doing something which is beyond the power or readiness of the Commission to define. We respectfully submit that such an order, while far too vague to permit of enforcement, would leave Bingler in an unwarranted state of uncertainty concerning the permissible scope of its future operations and is therefore void. As a concrete example of what we have in mind, if this cease-and-desist order becomes effective may Bingler continue to transport passengers from New York City in special operations to Lake Hopatcong or Graymoor (Exhibit No. 50 of the record before the Commission), there leave them to their own devices for a stated interval, and subsequently on the same day return them to New York City? Under the Commission's findings and order, Bingler is left to unrelieved conjecture. Manifestly, we submit, the District Court is in error in stating as follows in its sixth conclusion of law:

> The cease-and-desist order is not void for vagueness or indefiniteness because of its direction that Bingler abstain from the performance of any transportation of the character found in the Commission's final report to be beyond the scope of Bingler's authority under its certificate. The Commission has gone to considerable lengths in advising Bingler of the factors relevant to a determination of its rights under its certificate. It has done so both in terms of the criteria of ordinary regular-route service, which Bingler must avoid, and in terms of the service which Bingler is authorized to carry on.

Since the Commission is a creature of statute, it goes almost without saying that it may not legally ex-

ceed its statutory powers. *Interstate Com. Com.* v. *Union P. R. Co., supra; Arkansas R. Commission* v. *Chicago, R. I. & P. R. Co., supra; Florida* v. *United States, supra.* It is immaterial that an order of the Commission may be in form within the delegated power if it is shown that, in substance, there has been a misuse or abuse of the power delegated, in which event the order must be set aside. *Interstate Com. Com.* v. *Union P. R. Co.,* 222 U.S. 541; *Lawrence* v. *St. Louis-San Francisco Ry. Co.,* 274 U.S. 588. And the disfavor with which the Courts look upon a lack of certitude in the Commission's findings, and the promptitude with which they reject such findings has come to be a matter of common knowledge. In *United States* v. *Chicago, M., St. P. & P. R. Co.,* 294 U.S. 499, for example, the Supreme Court of the United States, after reiterating its findings in prior proceedings that an order of the Commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power, had the following to say:

> We would not be understood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning. One gains at places the impression that the Commission looked upon the proposed reduction as something more than a disruptive tendency; that it found unfairness in the old relation of parity between Brazil and Springfield; and that the new schedule in its judgment would confirm Milwaukee in the enjoyment of an undue proportion of the traffic. The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. * * * We must

know what a decision means before the duty becomes ours to say whether it is right or wrong.

One of the clearest statements of the necessity for unequivocal discussion and findings by the Commission in respect to the basic facts upon which its decisions turn is found in *Baltimore & Ohio R. Co.* v. *United States,* 22 Fed. Supp. 533, 536-7, wherein the Court, speaking through Justice Learned Hand, expressed itself in part as follows at pages 536-7:

> [2-4] We do not think that the bare finding can be made to do so much duty. The purpose of findings in such cases is to enable the courts to discharge their proper function, which is to make sure that the Commission in the discharge of its highly specialized and technical duties, has followed the statute. We have no competence to review their conclusions upon questions of rate making, so far as they involve matters peculiar to transportation; it is to the last degree desirable that we should not concern ourselves with them, as the Supreme Court has said again and again; and we cannot so confine ourselves, when the findings are equivocal. It is true that a finding in the ordinary case that a rate is reasonable may conceal interpretations of law which it will be hard to detect, but there must be some compromise as to the statement in details. That does not excuse the absence here of some statement as to the other constitutive facts necessary before a "reasonable" rate can be disregarded and a lower one substituted. In this very case, for example, we do not, and cannot know whether the Commission supposed that it was free to reduce the rates in the interest of the shippers, or regardless of the effect that the reduction would have upon the revenues of the plaintiffs, or how far they considered the interests of the southern carriers, or the water carriers. Their conclusion may have been in fact justified, but we

> have no way of knowing it, and either we should have to abdicate our duty to enforce the law as we understand it, or we should have to substitute our own conclusions upon matters which only the Commission is fitted to consider. The Supreme Court has been increasingly insistent upon the necessity of findings upon the pivotal facts. The defendant says that in Florida v. United States, 292 U.S. 1, 54 S. Ct. 603, 78 L.Ed. 1077, the Commission's very jurisdiction to regulate intrastate rates hinged upon a finding that they directly affected interstate rates; and that here no jurisdictional facts are at issue. "Jurisdiction" is a treacherous word; we are not clear that the Commission's jurisdiction is not involved; but in any event in United States v. Baltimore & Ohio R.R., 293 U.S. 454, 464, 55 S. Ct. 268, 272, 79 L.Ed. 587, it was expanded to "quasi-jurisdictional" which was meant to cover all "indispensable" facts; and in United States v. Chicago, Milwaukee, St. Paul & P. R.R. Co., 294 U.S. 499, 504, 55 S. Ct. 462, 464, 79 L.Ed. 1023 the phrase, "basic or quasi-jurisdictional facts" was substituted, as in Morgan v. United States, 298 U.S. 468, 480, 56 S. Ct. 906, 911, 80 L.Ed. 1288. What findings are "basic" is a practical matter; those are such which we need to ascertain on what legal theory the Commission has proceeded; they are absent here, and we think that for this reason the two orders are invalid and should be set aside.

In holding in *Florida* v. *United States, supra,* that orders of the Commission which lack the support of proper findings cannot be sustained by the Courts, the Supreme Court of the United States expressed itself as follows at page 215:

> The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination,

> to the importance of which this court has recently adverted (Beaumont, S. L. & W. R. Co. v. United States, decided November 24. 1930, 282 U.S. 74, ante, 221, 51 S. Ct. 1), but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported.

The decisions thus literally cry out for the setting aside of orders such as this. How, in all fairness, can a defendant, in the language of *United States* v. *Chicago, M. St. P. & P. R. Co., supra,* be required by the Commission "to spell out, to argue, to choose between conflicting inferences" in order to determine what it may or may not do in the way of transportation? The inability or unwillingness of the Commission to delineate the elements which do not constitute a tour, as that term is used in Bingler's certificate, completely destroys the effectiveness of its findings in respect to the directly assailed operations as well as the effectiveness of the order directed to "transportation * * * of the character found in said report on oral argument to be beyond the scope of the authority heretofore granted to it"; obviously, we submit, the Commission and the District Court have been guilty of confused thinking which demands condemnation by this Court.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Exhibit No. 31 in the record before the Commission (now a part of the District Court record transmitted to the Supreme Court of the United States) discloses that between May 1, 1948, and September 30, 1948, $62,378.50, out of a total income of $77,893.90, was derived by Bingler from race-track operations. Exhibits 53, 54, and 55 and pages 392-3 of the same record show that during the periods embraced within the complaints Bingler operated a total of 789 trips to the Monmouth Park Race Track, to the Garden State Race Track, and to Asbury Park, at revenue per passenger ranging from $1.75 to $3.25. Thus the importance of this proceeding and the substantiality of the questions presented are self-evident.

There is the further fact that many, many motor common carriers of passengers hold certificates from the Commission authorizing special operations in round-trip sightseeing or pleasure tours, as evidenced by the fact that under date of February 1, 1954, pursuant to authority granted at the oral argument, Bingler submitted to the Commission a list of eighty such carriers, whose authority, in toto, fairly blankets the United States. A great many of them hold territorial or radial authority of the very sort held by Bingler. The question of the type of service which these carriers may render under these certificates is palpably of the greatest importance; they should not be left in doubt, as they will be left unless this Court exercises its good offices to make certain what is now vague and uncertain.

CONCLUSION

It is earnestly submitted that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

EDWARD G. WEISS,
140 Market Street,
Paterson, New Jersey,

WILMER A. HILL,
Transportation Building
Washington 6, D. C.,
Attorneys for Appellant.

Certificate of Service

I hereby certify that I have this day made service of the foregoing Statement as to Jurisdiction upon all parties of record by mailing by first-class mail a copy to each of the following attorneys:

George Rossi, Esquire,
Assistant United States Attorney,
Newark, N. J.

John H. D. Wigger, Esquire,
Special Assistant to the Attorney General,
Department of Justice,
Washington 25, D. C.

Leo H. Pou, Esquire,
Associate General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

Edward W. Currie, Esquire,
123 Main Street,
Matawan, N. J.

James F. X. O'Brien, Esquire,
17 Academy Street,
Newark, N. J.

S. Harrison Kahn, Esquire,
Investment Building,
Washington, D. C.

Jack R. Turney, Jr., Esquire,
2001 Massachusetts Ave., N. W.
Washington 6, D. C.

Dated at Washington, D. C., this 3rd day of October, 1955.

WILMER A. HILL